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NOS. 05-7496 and 05-7664 (8)

IN THE SUPREME COURT OF THE UNITED STATES

CECILIO MENDOZA-TORRES, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REYMUNDO TOLEDO-FLORES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

Respectfully submitted,

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Southern District of Texas
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QUESTIONS PRESENTED

As to all petitioners:

I. Has the Fifth Circuit erred in holding - in opposition to the Second, Third, Sixth, and Ninth Circuits - that a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and hence an "aggravated felony," under 8 U.S.C. § 1101(a)(43)(B), even though the same crime is a misdemeanor under federal law?

As to the petitioners in No. 05-7496 only:

II. For purposes of the third prong of plain-error review under Fed. R. Crim. P. 52(b), is the plain error of treating the Federal Sentencing Guidelines as mandatory (in contravention of this Court's decision in United States v. Booker, 125 S. Ct. 738 (2005)) a ***structural*** error that necessarily affects a defendant's substantial rights?

(SUBSIDIARY QUESTION: Should this Court hold this case pending this Court's resolution of a similar question in Washington v. Recuenco, No. 05-83, cert. granted, 126 S. Ct. 478 (Oct. 17, 2005)?)

III. Even if this type of Booker error is not structural, has the Fifth Circuit nevertheless misapplied this Court's decision in United States v. Dominguez Benitez, 542 U.S. 74 (2004), by requiring more than a "reasonable probability" that this error affected a defendant's sentence?

IV. Should this Court grant certiorari to resolve the deep, three-way circuit split respecting the proper application of the plain-error rule to unpreserved Booker error?

V. Should this Court overrule its prior decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), and hold that, where the fact of a prior conviction raises the applicable statutory maximum, the Constitution requires that such prior conviction be alleged in the indictment (in federal prosecutions) and proved to a jury beyond a reasonable doubt?

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PREAMBLE

Pursuant to Supreme Court Rule 15.8, petitioners Cecilio Mendoza-Torres, et al., in No. 05-7496, and petitioner Reymundo Toledo-Flores in No. 05-7664, hereby file the following joint Supplemental Brief in support of their respective petitions for a writ of certiorari.[1]

SUPPLEMENTAL BRIEF OF PETITIONER

The Seventh Circuit's Recent Published Decision in Gonzales-Gomez v. Achim, ____ F.3d ____, 2006 WL 708678 (7th Cir. Mar. 22, 2006), Directly Conflicts With the Fifth Circuit's Rulings in These Cases, Thereby Widening the Split of Authority on the First Question Presented.

Very recently, on March 22, 2006, the Seventh Circuit issued a published decision that conflicts with the Fifth Circuit's decisions in these cases respecting the first question presented, namely, "the question whether a state-law felony that would be punishable only as a misdemeanor by federal law is nevertheless an 'aggravated felony.'" Gonzales-Gomez v. Achim, No. 05-2728, ____ F.3d ____, 2006 WL 708678, at *1 (7th Cir. Mar. 22, 2006). The Seventh Circuit, speaking through Judge Posner, answered that question in the negative, see id. at *1-*4; and it explicitly noted that the Fifth Circuit had reached a different result. See id. at *1 (citing United States v. Hernandez-Avalos, 251 F.3d 505, 507-08

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[1] Petitioners file jointly because the government filed a single consolidated response to both of these petitions.

(5th Cir. 2001)).

In rejecting the government's contrary arguments, the Seventh Circuit held that the government's interpretation of the statutes at issue "[was] a strained reading of the statutory language, [was] inconsistent with the interest in uniform standards for removal, and [was] inconsistent with the legislative history." Id. And, indeed, Gonzales-Gomez is notable for its thoughtful analysis of the statutory language, legislative history, and policy considerations at play in this issue. See id. at *1-*4.

Although Gonzales-Gomez was an immigration case, rather than a criminal case, its interpretation of the statute is equally valid in the latter context. Cf. Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (declining to interpret 18 U.S.C. § 16 differently in the immigration context than in the criminal law context "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context . . ."). And Gonzales-Gomez's strongly-worded rejection of the Fifth Circuit's position on this question, thereby increasing the dissension among the circuits on this question, makes it even more important for this Court to decide this question, whether in Lopez v. Gonzales, No. 05-547, in the present cases, or in some other case.

For the foregoing reasons, as well as those previously expressed, this Court should, at a minimum, hold *both* of these petitions, as to *all* petitioners, pending the disposition of the petition for writ of certiorari in Lopez v. Gonzalez, No. 05-547; and, if certiorari is granted in Lopez, then further hold these

petitions (again as to all petitioners) pending a decision in Lopez. Alternatively, this Court should grant certiorari to decide this question in one or more of petitioners' cases,[2] and then hold the balance of petitioners' cases pending a decision thereon.

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[2] In their joint reply to the Brief for the United States, counsel recommended, in the event that the Court chose to follow this course, that this Court grant certiorari (1) as to petitioner Mendoza-Torres in No. 05-7496; and/or (2) as to petitioner Toledo-Flores in No. 05-7664. See Pet'rs'. Reply Br. 6.

CONCLUSION

For the foregoing reasons, as well as those set forth in the original petitions for writ of certiorari and the petitioners' joint reply to the Brief for the United States, the above-captioned petitioners pray that this Court grant certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in their cases.

Date:
March 23, 2006

Respectfully submitted,

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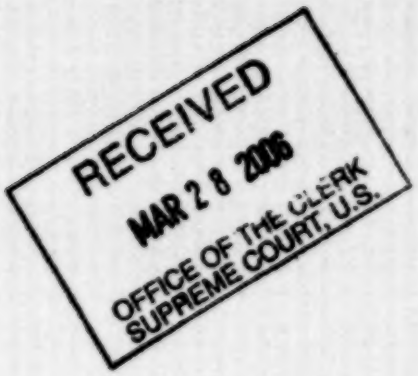
NOS. 05-7496 and 05-7664

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Petitioners,

v.

UNITED STATES OF AMERICA,
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REYMUNDO TOLEDO-FLORES,
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v.

UNITED STATES OF AMERICA,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

TIMOTHY CROOKS, a member of the Bar of this Court and appointed under the Criminal Justice Act, certifies that, pursuant to Rule 29.5, he served the preceding Petitioners' Supplemental Brief of Petitioiners in Support of Petitions For Writ of Certiorari on counsel for the Respondent by enclosing a copy of these documents in an envelope, to be delivered at defense counsel's expense, by Federal Express, No. 8493 0128 3926, and addressed to:

The Honorable Paul D. Clement
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave. NW
Washington, D.C. 20530

and depositing the envelope in the Federal Express Drop Box, 440 Louisiana, Houston, Texas 77002, today, March 23, 2006, and by electronic mail today to the Office of the Solicitor General at SupremeCtBriefs@USDOJ.gov. He further certifies that all parties required to be served have been served.

Timothy Crooks
TIMOTHY CROOKS

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March 23, 2006

FEDERAL EXPRESS NO. 8278 9680 3730
Mr. William K. Suter, Clerk
Supreme Court of the United States
1 First Street NE
Washington, D.C. 20543

Re: Petitioners' Supplemental Brief in Support of Petitions For Writ of Certiorari
Cecilio Mendoza-Torres v. United States,
Reymundo Toledo-Flores v. United States

Dear Mr. Suter:

Enclosed are the original and ten copies of the Petitioners' Supplemental Brief in Support of Petitions For Writ of Certiorari for filing in the case of Cecilio Mendoza-Torres, et al., Petitioners v. United States of America, Respondent; and the original and ten copies of the Petitioners' Supplemental Brief in Support of Petitions For Writ of Certiorari for filing in the case of Reymundo Toledo-Flores, Petitioner v. United States of America, Respondent.

As indicated in the enclosed certificate of service, a copy of the Petitioners' Supplemental Brief in Support of Petitions For Writ of Certiorari has been mailed to the Solicitor General of the United States.

Very truly yours,

Timothy Crooks for

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

MAM:mkc
Enclosures

cc: The Honorable Paul D. Clement **FEDERAL EXPRESS NO. 8493 0128 3926**
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